JD(SF)-43-03
Pasadena, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTER-CON SECURITY SYSTEMS, INC.
Employer

and **Case No. 21-RC-20520**

INTERNATIONAL UNION, SECURITY, POLICE, AND FIRE PROFESSIONALS OF AMERICA (SPFPA)
Petitioner

and

NATIONAL UNION OF SECURITY PROFESSIONALS
Intervenor

Damon M. Ott, Atty. (Littler Mendelson)**,** San Francisco, CA, and Carla **Feldman**, general counsel of the Employer, for the Employer

Scott Brooks, Atty. (Gregory, Moore, Jeakle**,** Heinen, & Brooks, P.C.) Detroit, MI for the Petitioner

Yuan Y. Chen, Atty., (Rothner, Segall & Greenstone), Pasadena, CA, for the Intervenor

ADMINISTRATIVE LAW JUDGE REPORT AND RECOMMENDATIONS ON OBJECTIONS AND CHALLENGES

LANA PARKE, Administrative Law Judge. Pursuant to a Decision and Direction of Election issued on December 3, 2002[1], an election by mail ballot was conducted under the direction and supervision of the Regional Director of Region 21 of the National Labor Relations Board (the Board or NLRB) between February 7 and March 20 in the three units found appropriate, respectively, units A, B, and C:

> Unit A: All security officers employed by the Employer under the State of California, California Highway Patrol Emergency Master Contract for unarmed guard services at the Northern California locations currently covered by the Master Contract; excluding all non-guards and supervisors as defined in the Act.[2]

[1] All dates are in 2003 unless otherwise indicated.

[2] The California Highway Patrol (CHP) oversees this master service agreement (MSA) for guard services provided by the Employer to the State of California.

Unit B: All security officers employed by the Employer under the State of California, California Highway Patrol Emergency Master Contract for unarmed guard services at the Southern California locations currently covered by the Master Contract (excluding the San Diego and Imperial Valley area locations); excluding all non-guards and supervisors as defined in the Act.

Unit C: All security officers employed by the Employer under the State of California, California Highway Patrol Emergency Master Contract for unarmed guard services at the San Diego and Imperial Valley area locations currently covered by the Master Contract; excluding all non-guards and supervisors as defined in the Act.

The Region served a tally of ballots in each of the above units upon the parties following the election:

TALLIES OF BALLOTS			
Ballot Count	Unit A	Unit B	Unit C
Number of Eligible Voters	780	326	60
Ballots cast for the Petitioner	110	62	22
Ballots cast for the Intervenor	31	12	0
Ballots cast against both participating labor organizations	117	47	9
Void Ballots	37	7	0
Challenged Ballots	57	25	0

The challenged ballots in Unit A are sufficient in number to affect the results of the election. The challenged ballots, if counted, would determine if the Petitioner or Employer has received a majority of the valid votes cast or if they qualify for a run-off election. The Intervenor could not receive a majority of the valid votes cast or qualify for a run-off election in Unit A.

The challenged ballots in Unit B are sufficient in number to affect the results of the election. The challenged ballots, if counted, would determine if the Petitioner has received a majority of the valid votes cast or if the Petitioner and Employer qualify for a run-off election. The Intervenor could not receive a majority of the valid votes cast or qualify for a run-off election in Unit B.

There were neither challenged nor void ballots in Unit C. The tally of ballots shows that the Petitioner has received a majority of the valid votes cast in Union C.

On March 26 and 27, respectively, the Intervenor filed timely objections to conduct affecting the results of the election and supplemental objection. On March 27, the Employer filed timely objections to conduct affecting the results of the election. On April 30, the Regional Director issued a Supplemental Decision and Notice of Hearing, setting the challenged ballots noted above and the objections of the Employer and the Intervenor for hearing. I conducted a hearing in Los Angeles, California, May 20 through 22.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Employer and the Petitioner, I make the following

Findings of Fact and Discussion

I. Challenged Ballots

A. Unit A

1. Names not on the December 10, 2002 Excelsior list

The Intervenor challenged the ballots of the following 25 voters because their names did not appear on the Employer's original *Excelsior* list submitted December 10, 2002.[3] The parties stipulated their hire dates are as follows:

Name	Hire date	Name	Hire date
Terry Atkinson	1/21/03	Angela Milton	12/23/02
Chip Benson	12/11/02	Henna Naseem	1/21/03
Lee Chang	12/23/02	Abayoni Ogundairo	1/2/03
Vickie Cobine-Burton	1/5/03	Vera Oleynik	12/23/02
Vincent Darrah	12/5/02	Timothy Raymond	1/9/03
Donald Flowers	1/2/03	Joshua Saldana	1/25/03
Shamil Galyautdinov	12/11/02	Jack Simpson	2/4/03
Patricia Holt	1/27/03	Dwaine Smith	1/21/03
Mister Jembere	1/9/03	Norma Tezarres	1/27/03
Kerwyn Jones	1/21/03	Tia Troutman	1/21/03
David Kersey	1/21/03	Borris Tsitsver	12/11/02
Bruce Klempner	12/11/02	James Waterman	12/12/02
John Lincoln	12/10/02		

The Employer and Petitioner contend the 25 voters listed above are eligible to vote as they were employed in Unit A on the payroll cut-off date for eligibility (November 30, 2002), or soon thereafter, and were employed through the date of the tallies of ballots (March 20).[4] In its brief, the Employer further contends that because of unnecessary and excessive delay of the election, employees hired after the cutoff date should be allowed to vote. In mail ballot elections, individuals are deemed to be eligible voters if they are in the unit on both the payroll eligibility cutoff date and on the date they mail their ballots to the Board. *Dredge Operators, Inc.,* 306 NLRB 924 (1992). While the rule is not rigidly applied,[5] the Employer has cited no authority to support altering the general rule in this case. The Employer's reliance on *Atlantic Industrial Constructs, Inc.,* 324 NLRB 355 (1997) is misplaced. The Board did not reach the issue of whether the eligibility cutoff date should be changed. Moreover, there is no evidence in this case of administrative error or misjudgment by the Region. The eligibility cutoff date and the election period are consistent with the challenging administration of mail-ballot elections in extensive and geographically far-flung units. As none of the above employees was employed in any of the units as of the eligibility cut-off date, I recommend the challenges to their ballots be sustained.

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[3] An *Excelsior* list is an election eligibility list supplied to the Region by the employer containing the names and addresses of all eligible voters. The Region then makes this information available to all parties. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966).

[4] In its post-hearing brief, the Petitioner inadvertently misstates that the parties stipulated to the ineligibility of the above employees and Jim Erik Villanueva.

[5] *Catholic Healthcare West Southern California d/b/a Marian Medical Center,* 339 NLRB No. 23 (2003).

The Intervenor also challenged the ballot of Joseph Puccio. At the hearing, the parties stipulated he is an eligible voter. Accordingly, I recommend his ballot be opened and counted.

2. Unit A employees no longer employed

The Intervenor and the Employer challenged the ballots of 12 voters as being no longer employed in Unit A. The Intervenor challenged the ballots of James Abrichi, Sam J. Alcanter, and Francis Kumar; the Employer challenged the ballots of Ernest Cournyer, Kinisha Doley, Ethel Hatfield, Earnest Johnson, Munir Khan, William Roeder, Jr., Elias Vergara, and William Were; both the Intervenor and the Employer challenged the ballot of Roger W. Smith. At the hearing, the parties stipulated that Sam J. Alcanter and Francis Kumar are eligible voters. The parties further stipulated that James Abrichi, Kinisha Doley, Ethel Hatfield, Earnest Johnson, Munir Khan, and William Were are not eligible voters. The following four ballots remain unresolved:

William Roeder, Jr.	Elias Vergara
Ernest Cournyer	Roger W. Smith

Consistent with the parties' stipulations, I recommend the ballots of Sam J. Alcanter and Francis Kumar be opened and counted. I recommend that the ballots of James Abrichi, Kinisha Doley, Ethel Hatfield, Earnest Johnson, Munir Khan, and William Were be sustained.

As to the remaining four ballots (Ernest Cournyer, William Roeder, Jr., Elias Vergara, and Roger W. Smith), the Petitioner contends they were employed in Unit A on the November 30, 2002, eligibility cut-off date through the date they returned their mail ballots and are eligible to vote. The Employer asserts that Roger W. Smith was terminated prior to the date he mailed his ballot and that it should not be counted. At the hearing, the parties stipulated that the sealed ballot envelopes returned by three of the four bore the following dates:

Ernest Cournyer -- postmarked February 17, 2003.
William Roeder, Jr. -- date stamped February 13, 2003 when received by the Region.
Elias Vergara – postmarked February 15, 2003.

The challenging parties have the burden of proving that challenged individuals are not eligible to vote. No evidence was presented to show that any of the four employees, Ernest Cournyer, William Roeder, Jr., Elias Vergara, or Roger W. Smith, was not an eligible voter. Although the Employer, in its post-hearing brief, argued that Roger W. Smith was terminated prior to the date of the election, the record evidence does not support that argument.[6] Accordingly, I conclude that neither the Intervenor nor the Employer has met its burden of proof and recommend that the ballots of Ernest Cournyer, William Roeder, Jr., Elias Vergara, and Roger W. Smith be opened and counted.

[6] The Employer cites to testimony by Guadalupe Garcia (Ms. Garcia) at page 201 of the transcript, but her testimony relating to Roger W. Smith's employment neither provides a termination date nor supports a clear inference of one: "Roger Smith? Uh, he hasn't been working for us for awhile. He has been on modified duty. And so I am not --- he is not stationed anywhere…last position that I remember was with United…"

3. Irregularities on mail-ballot return envelopes

The Intervenor challenged the ballots of Jeff Colen, David Cote, and Robert A. Wagner because of irregularities with their ballot return envelopes as noted below:

Jeff Colen -- returned ballot in envelope with wrong employee key number
David Cote -- returned ballot in non-regulation envelope with key number, case number and signature.
Robert A. Wagner -- signed the name "John Hancock" on the signature line of the envelope.

The Petitioner asserts that the procedural irregularities of these three ballots should be disregarded as minor and that the ballots should be opened and counted. The Intervenor argues they should not be counted, as there is no way to assure the irregular envelopes actually contain unit employees' ballots. The Employer argues that David Cote's ballot should be opened and counted but that the challenges to the ballots of Jeff Colen and Robert A. Wagner should be sustained.

There is no evidence to suggest that because one envelope bore an incorrect employee key number, the ballot did not come from eligible voter, Jeff Colen, whose name and signature it bore. Further, there is no evidence that the use of a nonofficial envelope bearing identifying voter information casts any reasonable suspicion on the authenticity of David Cote's ballot. Each of these returned envelopes bore sufficient information to permit identification of the voter from whom it originated. However, the envelope purportedly containing the ballot of Robert A. Wagner is missing critical identifying information, i.e., Mr. Wagner's signature. Although the return envelope was apparently facetiously signed "John Hancock," the absence of a valid signature prevents verification of the ballot's authenticity by signature check.

The Board seeks to give effect to voter intent and preference "whenever possible." *Daimler-Chrysler Corp,* 338 NLRB No. 148 at slip op 2 (2003), in which the Board also stated:

> The Board's primary goal…is to protect the right of individual employees to choose whether or not to be represented by a union. *General Shoe Corp.,* 77 NLRB 124, 127 (1948) enfd. 192 F.2d 504 (6th Cir. 1951), cert. denied 343 U.S. 904 (1952). Congress has entrusted the Board with a wide degree of discretion to establish the procedures and safeguards necessary to ensure this fair and free choice by employees. *NLRB v. A.J. Tower Co.,* 329 U.S. 324, 330-331 (1946).

By mailing in their ballots, Jeff Colen and David Cote "evinced an intent to register a preference [as to union representation]." The envelopes in which they returned their ballots carried identifying marks sufficient to confirm the two voters' identity. There is nothing in the irregularities of their envelopes that reasonably casts doubt on the authenticity of the ballot or that should "negate [the voters'] expression of preference." See *Id* at slip op. 3. Accordingly, I recommend that the ballots of Jeff Colen, David Cote, be opened and counted. As the envelope purportedly containing the ballot of Robert A. Wagner is missing a critical identifying mark, I recommend the challenge to that ballot be sustained.

4. Ballot voided because of writing on it

In its brief, the Employer contends the Region's voiding of a ballot cast in the Unit A election because "Inter-Con Is the lesser of three evils" was written on it should be reversed. The Employer argues, correctly, that it is the policy of the Board to give effect to any

unambiguous expression of voter intent as expressed on the ballot even if the ballot is marked irregularly. *Daimler-Chrysler Corp.,* supra; *Hydro Conduit Corp.,* 260 NLRB 1352 (1982). I cannot, however, address the Employer's argument because evidence regarding the voided ballot is unclear. The only evidence came from the testimony of Ms. Garcia:

A …one [voided ballot], once it was opened, I think that it had a comment that Inter-Con was the lesser of three evils. And so they voided it and set it aside.
Q And so looking to that ballot --- now, that was the outside envelope, or the ballot itself?
A I want to say the ballot itself. But I am not for sure.
….
Q Okay. And was any explanation for the voiding of that ballot offered by the Board agent?
A I want to say because it had some kind of writing on it. And I assume, because we might be able to pinpoint who it was. I don't know exactly.
….
Q And can you remember if the ballot was marked for one of the --- three possible markings?
A I can't remember.
Q But you remember the writing that was on it?
A Right. I think it was Inter-Con. But I'm not for sure.

At the tally, no party objected to the voiding of this ballot. Given the uncertain testimony, there is no evidentiary basis for reversing the Region's decision to void the ballot.

B. Unit B

1. Names not on the December 10, 2002 Excelsior list

The Intervenor challenged the ballots of Irene Lopez, Charlene Turner, and Jim Erik Villanueva because their names did not appear on the Employer's original Excelsior list submitted December 10, 2002. At the hearing, the parties stipulated that Irene Lopez and Charlene Turner are eligible voters. The ballot of Jim Erik Villanueva remains challenged. The parties stipulated that his hire date is January 12. In accordance with the parties' stipulation, I recommend that the ballots of Irene Lopez and Charlene Turner be opened and counted. As Mr. Villanueva was not employed in any of the units as of the eligibility cut-off date, I conclude he is not an eligible voter, and I recommend the challenge to his ballot be sustained. See *Dredge Operators, Inc.,* supra.

2. Employees terminated prior to the March 20 ballot count

The Employer challenged the ballots of Alicia Antunez, Francisco C. Benevente, Samuel Cunningham, Daniel Guerra, Marvin Hunter, Luis Juarez, Thurman Mosley Jr., Vincente Pacheco, Michael R. Sanchez Michael Tully, Robert L. Wallace, and Warren Woods because they were no longer employed as of the ballot tallies. At the hearing, the parties stipulated that Luis Juarez, Michael R. Sanchez, and Warren Woods are eligible voters and that Alicia Antunez, Francisco C. Benevente, Samuel Cunningham, Daniel Guerra, Thurman Mosley Jr., Arturo Ordona, Vincente Pacheco, Michael Tully, and Robert L. Wallace are not eligible voters. The ballot of Marvin Hunter remains unresolved. In accordance with the parties' stipulations, I conclude that Luis Juarez, Michael R. Sanchez, and Warren Woods are eligible voters, and I recommend that their ballots be opened and counted. In accordance with the parties' stipulations, I conclude that Alicia Antunez, Francisco C. Benevente, Samuel Cunningham,

Daniel Guerra, Thurman Mosley Jr., Arturo Ordona, Vincente Pacheco, Michael Tully, and Robert L. Wallace are not eligible voters, and I recommend that the challenges to their ballots be sustained.

The Petitioner contends Marvin Hunter is an eligible voter as he was employed in Unit B on the payroll eligibility cut-off date through the date he returned his mail ballot. The Intervenor took no position. The parties stipulated that the sealed ballot envelope returned by Marvin Hunter was date stamped February 18, 2003 when received by the Region. The revised Excelsior list submitted to the Board by the Employer on March 19, showed Marvin Hunter as an employee in unit B. As there is no evidence that Marvin Hunter was not employed in unit B on both the payroll eligibility cutoff date and on the date he mailed his ballot to the Board, he is deemed to be an eligible voter. *Dredge Operators, Inc.,* supra. I recommend his ballot be opened and counted.

C. Challenges based on supervisory status

1. The Employer's job classifications and duties

The MSA is administered by the Employer's Security Program Manager, Juan Covarrubias. He has ultimate oversight responsibility for employees in the following classifications, listed in descending order of authority:

Project Manager – of whom there are two, covering Northern and Southern California, respectively.
Area Manager – also called Office Manager, of whom there is one.
Contract Guard Supervisor (CGS) – also called field supervisor
Security Guard Manager (SGM)
Security Guard Supervisor (SGS)
Security Guard 2 (SG2)
Security Guard 1 (SG1)

The parties stipulated that employees in the SG1 and SG2 positions are not supervisors within the meaning of Section 2(11) of the Act.

CGS's oversee about 10-15 work sites under the MSA, encompassing a total of 30-40 guards. CGS's have no authority to hire, fire, promote, transfer, demote, or discipline any employee. They interact with clients (state agencies) and with the SGM and/or SGS employees at the sites. They provide liaison between the Employer and the clients, do scheduling, assist with billing and payroll, and distribute paychecks. CGS's conduct site visits to ensure officers report for work on time, on schedule, and meet appearance standards. They notate a Field Report Daily Log, a checklist, at each site. CGS's report deficiencies and other problems to the Area Manager or Project Manager who directs the CGS's in resolving the problems. While CGS's may recommend discipline, such as employee removal from the site or termination, the Project Manager and/or Area Manager conduct independent investigations. The Project Manager and/or Area Manager review any CGS employment action recommendation.

The duties of SGS's and SGM's are essentially the same. They have no authority to hire, fire, promote, transfer, demote, or discipline any employee. SGS's and SGM's directly oversee officers at particular worksites and report to the assigned CGS. They may recommend employment action to the assigned CGS or directly to the Employer's office whereupon the procedure described above is followed.

2. Supervisory challenges in Unit A

At the hearing, the Intervenor withdrew its challenges to the ballots of Aryind Chandra, Joe W. Miller, Charley Thomas, Jr. and Stephen Young as supervisors. No challenge remaining to their ballots, I recommend they be opened and counted. The Intervenor continues to challenge the ballots of the following seven employees as supervisors as defined in Section 2(11) of the Act. The parties stipulated to the classification of each employee except Paul B. Smith [sic] [7]:

Bruce Donat -- SGS	Michelle Ramirez -- SGM
Willie Gooch -- SGS	Paul B. Thomas
Gerald Patterson --SGS	Lillian Torres – SG2
Terry Proctor -- SGS	

The Petitioner contends that the seven voters are not supervisors and are, therefore, eligible to vote.

The Petitioner challenged the ballots of the following five employees as supervisors as defined in Section 2(11) of the Act; their classifications are as follows:

Jonathan Cullifer -- CGS	Jose A. Morales -- CGS
Michael Doud -- CGS	Gene Stinson -- CGS
Angela Moore -- CGS	

The Intervenor takes no position as to the eligibility these latter five employees. The Employer contends that all 12 of the above employees challenged as Section 2(11) supervisors are unit employees and eligible to vote. In its post-hearing brief, the Petitioner argues that the above five employees can effectively recommend employees be fired, can send employees home or relieve them of duty, and are responsible for other supervisory duties, making them statutory supervisors.

3. Supervisory challenges in Unit B

At the hearing, the Intervenor withdrew its challenge to the ballot of Carlos Hernandez as a supervisor. No challenge remaining to his ballot, I recommend it be opened and counted. The Intervenor challenged the ballots of the following eight employees as supervisors as defined in Section 2(11) of the Act; their classifications are as follows:

Michelle Chiles – SG2	Barbara Madden -- SGS
Gabriel Del Castillo -- SGM	Jose A. Perez -- SGM
Emmett Gilliard --SGM	Charles Prodan -- SGS
Brian Gray -- SGM	Guadalupe Vargas—SG2

[7] The parties stipulated that no unit employee named Paul B. Smith exists and agreed that the Region inadvertently misstated the name appearing on the ballot envelope of Paul B. Thomas as Paul B. Smith. No additional information was presented regarding Paul B. Thomas. I have assumed that he fits within one of the supervisory-challenged groups of CGS, SGS, or SGM. In light of my findings below, his specific classification is not important.

4. Discussion of supervisory challenges

Section 2(11) of the Act defines a "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. "The possession of even one of those attributes is enough to convey supervisory status, provided the authority is exercised with independent judgment, not in a merely routine or clerical manner." *Arlington Electric, Inc.,* 332 NLRB 74 (2000), quoting *Union Square Theatre Management,* 326 NLRB 70, 71 (1998).

By stipulation, SG2 employees are not supervisors within the meaning of the Act. Lillian Torres, Michelle Chiles, and Guadalupe Vargas are classified as SG2's. No evidence was adduced that would remove these three employees from the purview of the stipulation. Accordingly, I conclude they are not supervisors and that their ballots should be opened and counted.

While the CGS's, SGS's, and SGM's are denoted supervisors or managers, the Board cautions that an individual's title alone cannot establish whether that individual is a supervisor. *Pan-Osten Co.,* 336 NLRB No. 23 (2001); *Williamette Industries, Inc.*, 336 NLRB No. 59 (2001). No evidence shows that any of the CGS's exercised any significant independent judgment in performing their work oversight duties rather than carrying out merely routine or clerical functions. The Board, charged with responsibility to determine the degree of discretion required for supervisory status,[8] is careful not to give too broad an interpretation to the statutory term "independent judgment" because supervisory status results in the exclusion of the individual from the protections of the Act. *Tree-Free Fiber Co.,* 328 NLRB 389 (1999). The Board does not find the exercise of only "routine" authority, i.e. that which does not require the use of independent judgment in directing the work of other employees, to fit within the ambit of Section 2(11) of the Act. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB No. 54 (2001). Even accepting that the CGS's were regular observers and reporters of employee performance, the exercise of some supervisory authority in a routine, perfunctory, or sporadic manner does not equate to supervisory status. *Medtech Security, Inc.,* 329 NLRB 929 (1999); *Masterform Tool Co.,* 327 NLRB 1071, slip op. at 1 (1999); *Polynesian Hospitality Tours,* 297 NLRB 228, enfd. 920 F.2d 71 (D.C. Cir. 1990); *Beverly Health,* supra. The CGS's duties did not call for independent judgment, and their authority was exercised in a routine manner following set procedures established by upper management. They made checklist observations during site visits and referred any significant problem or employment concern to upper management. Nothing in their job performance demonstrated "the exercise of independent judgment [rather than the]…routine decisions typical of leadmen…." *Arlington Electric,* above, at p. 75. Accordingly, I conclude that the CGS's are not supervisors as defined in the Act and that their ballots should be opened and counted.[9]

[8] NLRB v. Kentucky River Community Care, 121 S. Ct. 1861, 1867-1868 (2001).

[9] Very little evidence was adduced regarding the duties of specific employees challenged as supervisors. However, I have considered evidence related to specific individuals as well as evidence about the classifications generally. I find no significant inconsistencies between the specific and the general evidence.

Inasmuch as I have concluded that the CGS's are not supervisors as defined in the Act, it follows (and there is no evidence to indicate otherwise) that the SGS's and SGM's who report to the CGS's also are not supervisors as defined in the Act. Accordingly, I conclude that the ballots of the following employees should be opened and counted:

Michelle Chiles	Jose A. Morales
Jonathan Cullifer	Jose A. Perez
Gabriel Del Castillo	Gerald Patterson
Bruce Donat	Charles Prodan
Michael Doud	Terry Proctor
Emmett Gilliard	Michelle Ramirez
Brian Gray	Gene Stinson
Willie Gooch	Paul B. Thomas
Barbara Madden	Lillian Torres
Angela Moore	Guadalupe Vargas

II. Objections

A. The Employer's Objections Nos. 1, 2, 4 and Intervenor's Objection No. 1

The Employer's Objections Nos. 1, 2, and 4 and Intervenor's Objection No. 1 relate to the logistics of the election proceedings.

By its Objection No. 1, the Employer contends that the relatively low number of valid votes cast as set forth above shows that mail ballot elections "depress voter turnout" and that an election by manual vote should have been conducted. By second decision dated January 24, 2003, the Regional Director of Region 21 directed that the election herein be conducted entirely by mail ballot. The Employer requested Board review of the Regional Director's determination, which appeal the Board denied. The Employer seeks to raise essentially the same arguments it raised in its appeal to the Board. Inasmuch as the Board has already addressed and resolved those issues, and as the Employer did not adduce at the hearing any newly discovered or previously unavailable evidence or allege that any special circumstances exist herein which would require the Board to reexamine its earlier decision, I find no basis in Objection No. 1.[10] I conclude that it should be overruled.

By its Objection No. 2, the Employer asserts that the Region's decision to utilize the payroll period immediately preceding the December 3, 2002 Decision and Direction of Election (November 30, 2002) as the voter eligibility cut-off date disenfranchised employees hired after November 30, 2002. The Employer addressed this same issue in its argument regarding challenges to employees hired after the cutoff date. As set forth above, in mail ballot elections, individuals are deemed to be eligible voters if they are in the unit on both the payroll eligibility cutoff date and on the date they mail in their ballots. *Dredge Operators, Inc.,* supra. The Employer has presented no evidence that employees employed during that period did not constitute a representative group or that the use of that period tainted representational rights. I conclude that the Employer's Objection No. 2 should be overruled.

[10] At the hearing, the Employer made an offer of proof to the effect that the Employer gave the Board necessary information to effectuate manual balloting. As I find this issue irrelevant, I rejected the offer of proof.

As to its Objection No. 4, the Employer contends that a message included in ballot kits mailed on and after February 19 to the effect that ballots received after February 21 would not be counted, discouraged voters from returning their ballots. The first mailing of ballots was February 7 with ballot tally to occur February 21. In ballot mailings of February 19, the Region included a message that the tally was scheduled for February 21 but employees were encouraged to mark and return ballots, as "[t]here is a possibility that ballots received after the scheduled tally date may still be counted." The Region rescheduled the tally twice thereafter, to March 6 and March 20, respectively. Ballots mailed February 20 and 21 included a message to voters that the tally had been rescheduled to March 6 and that it was likely that ballots returned prior to the start of the tally on March 6 would be counted. The Region encouraged employees to return their ballots.[11] The Employer cites *City Wide Insulation of Madison, Inc., d/b/a Builders Insulation Inc.,* 338 NLRB No. 108 (2003) where, in an election postponed for administrative reasons, the Board noted, "[I]t would be preferable for Regional Offices to include in any notice of rescheduled election a statement that the election has been rescheduled for administrative reasons beyond the control of the employer or the union. The inclusion of such language would dispel any erroneous impression among employees that an either the employer or the union was responsible for the election's rescheduling." The Board did not, however, find the circumstances of that case warranted setting aside the results of the election. There is no evidence that tally date rescheduling or any other administrative action herein dissuaded employees from returning ballots. I conclude the Employer has not shown any circumstances related to this objection that warrants setting aside the election. I recommend Employer's Objection No. 4 be overruled.

In its Objection No. 1, the Intervenor contends that inaccuracies on the *Excelsior* lists provided by the Employer caused a one-month postponement of the ballot tallies and impermissibly interfered with the election. The evidence reveals that, through no fault of the Employer, a number of inaccurate employee addresses existed on the *Excelsior* lists provided by the Employer. The Region learned of some address inaccuracies when mail ballots were returned by the postal service as undeliverable and of others when the Intervenor or the Petitioner so notified the Region. Sometimes the Intervenor or the Petitioner was able to provide a correct address, sometimes not. In all instances, the Region alerted the Employer of address problems. The Employer then verified and/or submitted new addresses to the Region, which in turn remailed ballots as appropriate.[12]

The Intervenor is correct that the Board requires substantial compliance with *Excelsior* requirements. The Board has set aside an election where forty percent of the addresses on the original list were inaccurate and the corrected list was available for campaign use only eight days before the election. In those circumstances, unit employees were "effectively prevent[ed] from obtaining information necessary for the exercise of their Section 7 rights. In [such an election] decided by a close margin, this lack of information may have impeded a free and

[11] In her Supplemental Decision and Notice of Hearing dated April 30, the Regional Director states, "The Region did not mail out ballot kits after on or about February 21, 2003." The Employer contends the Region effected later mailings, citing as evidence the Region's email of February 25 to the Employer's attorney requesting address verification for numerous employees identified by the Intervenor as having incorrect addresses. In a reply email of the same date, the Employer informed the Region that it would "work diligently to provide updated information in an attempt to maximize voter participation." There is no evidence the Employer provided any corrected addresses following that email or that the Region mailed any additional ballots.

[12] In situations where the ballot had not been returned, the Region marked the second mailing with "D" for duplicate.

reasoned choice." *Mod Interiors, Inc.,* 324 NLRB at 164 (1997). Here there is no probative evidence as to the erroneous address percentage rate. The Region, with the Employer's cooperation, made extensive efforts to obtain correct addresses, to mail ballots to corrected addresses, and to extend the balloting period to accommodate address changes.[13] There is no evidence that the Region's efforts were unsuccessful. In the absence of evidence showing substantial uncorrected errors of the *Excelsior* list or that employees' "free and reasoned choice" was impaired,[14] I conclude that Intervenor's Objection No. 1 should be overruled.

Accordingly, I recommend that the Employer's Objections Nos. 1, 2, and 4, and the Intervenor's Objection No. 1 be overruled.

B. The Employer's Objections Nos. 3, 6, and 7

The Employer's Objections Nos. 3, 6, and 7 relate to the Region's conduct of the ballot tally. The Employer protests the tallies in the three units being held on a date when its outside counsel was unavailable to attend (Objection No. 3) and Board misconduct at the tallies. Specifically, the Employer protests the disallowance of note taking, not permitting a clear view of ballots, not giving an "adequate opportunity to challenge" void ballots, not allowing challenges to void ballots, "displaying a threatening demeanor to discourage challenges or questions," and other unspecified conduct of the Region.

The Region held the ballot count in this matter on March 20, a date when the Employer's lead counsel was unavailable. The Employer's general counsel, Carla Feldman (Ms. Feldman), and other Employer representatives were present at the ballot count. The Employer has not explicated how the absence of its lead counsel affected the fairness or validity of the election or the ballot count.

Representatives of all parties met to observe the ballot count herein and to challenge ballots if desired. Initially, the Board agent in charge instructed participants they could not take notes. Later, another Board agent reversed the prohibition.

Paralegal Nancy Difabio (Ms. Difabio) was present for the ballot count in Units B and C as the Employer's representative. Seven ballots were identified as void in Unit B; none was voided in Unit C. While Ms. Difabio was comfortable with her opportunity to challenge voters, she felt the Board agent did not give participants sufficient time to scrutinize voided ballots, resulting in her being unsure that ballots were properly voided. During the count, Ms. Difabio did not complain about inability to examine voided ballots, did not ask for additional time, and did not say she disagreed with the Board's decision to void the ballots.

Ms. Garcia, an area manager of the Employer, served as its representative at the ballot count in Unit A. Ms. Feldman was also present. The Board Agent showed the ballots rapidly, holding them up, turning them side-to-side, and allowing only two to three seconds observation per ballot. Ms. Garcia did not complain that insufficient time was given for ballot inspection and did not request closer inspection of any ballot. She challenged some ballots.

[13] The instant situation is different from that of *Laidlaw Medical Transportation, Inc.,* 326 NLRB 925 (1998) where the employer was unresponsive to requests for accurate *Excelsior* information.

[14] *Id.*

To set aside an election on the basis of Board agent conduct, the Board must be presented with facts raising a "reasonable doubt as to the fairness and validity of the election." *Allied Acoustics,* 300 NLRB 1181 (1990) and cases cited therein. Further, as the Board stated in *Mountaineer Bolt, Inc.,* 300 NLRB 667 (1990), "It is axiomatic that the Board, in considering objections to an election, looks only to evidence of conduct which occurred between the time the petition is filed and the election is held."[15] The Employer presented no evidence showing that the inability of its lead counsel to attend the ballot count herein had any "impact on the votes cast by the employees [or any] effect on the election atmosphere." *Id.* While the Employer's lead counsel was unable to attend the scheduled tallies, Ms. Feldman, who also participated in presenting the Employer's evidence at the hearing, attended. There is no evidence that lead counsel's absence in any way invalidated or impacted the fairness and accuracy of the ballot count. As to the alleged restriction of tally observers' right to participate in the proceedings by taking notes or having sufficient time to view ballots, there is no evidence of tampering, fabrication, misplacement, or loss of any ballots. There is no factual issue concerning the "accuracy or integrity" of the tally proceedings. *Allied Acoustics,* supra. In fact, the parties challenged various ballots, and no tally participant complained of the proceedings or requested additional time to examine a ballot. While there was an initial mistake concerning whether observers could take notes, that could not have interfered with the employees' fair and free choice in the election, and there is no evidence that the brief note-taking prohibition in any way affected the accuracy or integrity of the tallies.[16] Consequently, there is no reasonable basis to impugn the Board's neutrality or to infer that the parties' confidence in the election process was undermined.

Accordingly, I recommend that the Employer's Objections Nos. 3, 6, and 7 be overruled.

C. The Employer's Objection No. 8

The Employer contends that employment of Petitioner organizer, Joe McCray (Mr. McCray) by its competitor, Lyons Security, during the union campaign created "an improper conflict of interest" and indicated an improper motive for the Petitioner's organizing efforts.

Mr. McCray serves as the Petitioner's international representative and organizer. He also works as an assistant manager for Lyons Security. His duties include creating work schedules and monitoring invoices. No employees report to him, and he exercises no authority over any employee. He has no financial interest in the company.

The Board has held that "a union may not represent the employees of an employer if a conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be jeopardized…The employer bears the burden of showing that such a conflict of interest exists, and that burden is a heavy one." *Beverly Enterprises—North Dakota,* 293 NLRB 122 and FN 2 (1989). The Employer has not met that burden here. The evidence does not establish that Mr. McCray was a supervisory or managerial employee of the Employer's competitor or that he had any financial or other interest in either company that would be likely to motivate him to subordinate the interests of unit employees to further his own financial goals. Accordingly, I recommend that the Employer's Objection No. 8 be overruled.

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[15] See also *Naomi Knitting Plant,* 328 NLRB No. 180 (1999).

[16] The only evidence of any Board agent's "threatening demeanour to discourage challenges or questions" was testimony as to a Board agent's unfriendly manner, which is too vague and insignificant to be further addressed.

D. The Employer's Objections Nos. 9 and 10

The Employer's Objections Nos. 9 and 10 relate to the Petitioner's use of campaign material. Objection No. 9 alleges that the Petitioner's deceptive use of employee names and photographs as union supporters is objectionable.

Rafael Alvarez (Mr. Alvarez) worked for the Employer as a security guard at the Juniper Serra State Building in Los Angeles, California during the union organizing campaigns. In June or July 2002, at the Ronald Regan Building, Mr. Alvarez signed a union authorization card designating the Petitioner as his collective bargaining representative. A representative of the Petitioner then photographed Mr. Alvarez standing with Steve Moritas (Mr. Moritas), business agent of the Petitioner. Thereafter, without Mr. Alvarez' permission, the Petitioner published Mr. Alvarez' photograph along with those of other security guards in an undated campaign handout bearing the heading "WE'RE VOTING SPEFPA" (campaign handout) and in the Petitioner's July 2002 newsletter.

Earnest Smith (Mr. Smith), the Employer's SGM at the California Secretary of State building jobsite, supported the Petitioner in its campaign. In response to a query by Mr. McCray, Mr. Smith said he would like to work for the Petitioner on his days off.[17] In about February, Mr. McCray photographed Mr. Smith at his workstation. Without Mr. Smith's permission, the Petitioner published the photograph in the Petitioner's campaign handout.

Job Kahn (Mr. Kahn) works for the Employer as an SG-1. During the union organizing campaigns, he was assigned to the California Department of Water Resource located in Sacramento, California. In about January or February, Mr. Kahn told Mr. McCray that he would rather have the Petitioner win the election than the Intervenor. Mr. Kahn was "somewhat aware" that Mr. McCray or another union representative took his photograph but did not give permission for its publication. When his photograph was published in the Petitioner's campaign handout, Mr. Kahn told the guards he worked with that the photograph was misleading because it made people think he wanted the union, and he had not given consent for publication.

Khris Battiste (Mr. Battiste) worked for the Employer as a security guard at the Ronald Regan Building in Los Angeles during the union organizing campaigns. Mr. Battiste signed a union authorization card for the Petitioner, which stated the signer authorized the SPFPA as his "exclusive representative in collective bargaining."[18] In or after June 2002, Mr. Moritas took a photograph of Mr. Battiste to "show the union the dedication of employees at the Ronald Regan building." Although Mr. Battiste did not give permission for its publication, the Petitioner thereafter published Mr. Battiste's photograph in its July 2002 newsletter and October 2002 "UNION YES" magazine on the last page near the words, "Organize…It's time <u>*YOU*</u> joined America's Union for Security Professionals, SPFPA."

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[17] Mr. Smith did not, however, work for the Petitioner at any time.

[18] Mr. Battiste testified that he signed the card because Mr. Maritas told him it would help employees get wages that had been unpaid by the Employer's predecessor, United. However, Mr. Battiste read the card before signing it, and the card clearly states its purpose. There is no evidence of any misrepresentation by the Petitioner "calculated to direct the signer to disregard and forget the language above his signature," *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). The Petitioner could reasonably infer that Mr. Battiste signed the authorization card because he supported the Petitioner.

The thrust of the Employer's Objection No. 9 is that the Petitioner misrepresented the prounion positions of certain employees in its campaign materials, which misrepresentations improperly influenced the election results. Although the above witnesses did not give permission for the use to which the Petitioner put their photographs, it is by no means clear that the Petitioner misrepresented their opinions. Mr. Alvarez and Mr. Battiste signed the Petitioner's authorization cards, a clear sign of support; Mr. Smith admittedly supported the Petitioner, and Mr. Kahn gave at least grudging indication of support by saying he would rather have the Petitioner than the Intervenor. Even assuming the Petitioner was not fully veracious in claiming these employees supported its representational bid, the Petitioner's conduct in disseminating the photographs in its campaign literature was not objectionable. In *Midland National Life Insurance,* 263 NLRB 127 (1982), the Board returned to its *Shopping Kart Food Marts*[19] rule that it would not set aside an election because of campaign misrepresentations unless the misrepresentations involved misuse of the Board's election process or forged documents. The misrepresentations alleged by the Employer involve neither of those exceptions. They fall, therefore, within the precepts of *Midland National Life Insurance,* supra. While the unauthorized use of the above employees' photographs might be otherwise actionable, it does not constitute objectionable behavior warranting a new election. See *Gormac Custom, Mfg.,* 335 NLRB No. 94 (2001).

The Employer's Objection No. 10 alleges that the Petitioner improperly used the "Inter-Con Security Systems, Inc. name, symbol, letterhead, and/or logo in a July 2002 newsletter sent by the Petitioner to unit employees. The top quarter of the first page of the newsletter bears a heavily black-outlined box containing the words "SPFPA, California, security*Police*Fire Professionals of America" adjacent to the Petitioner's logo. Underneath that, a black bar with thick white lettering reads, "News for SPFPA – Inter – Con Security Officers July 2002." Underneath the black bar, the Employer's logo appears next to the headline, "Inter-Con Security Officers Welcome SPFPA." The Employer contends inclusion of its logo misled employees into believing that the newsletter originated with or was endorsed by the employer. I cannot agree. It is clear from the banner and content of the newsletter that it originated with the Petitioner. Moreover, there is nothing in the newsletter to imply Employer support of the Petitioner or the Intervenor. Assuming, arguendo, that the logo conveyed a message that the employer supported the Petitioner, it would, at most, constitute a campaign misrepresentation. Even misrepresentation of Board action is not a basis to set aside an election so long as a Board document has not been altered to give the impression that the Board endorses an election party. The Board expressly treats misstatements about Board neutrality the same as other misrepresentations. *Riveredge Hospital,* 264 NLRB 1094 (1982). "We see no sound reason why misrepresentations of Board action should be on their face objectionable or be treated differently than other misrepresentations." Id at 1095; TEG-LVI 326 NLRB 1469 (1998). The Employer cites no authority that the Board considers misrepresentations regarding employer neutrality to be any more opprobrious. Accordingly, I recommend that the Employer's Objection Nos. 9 and 10 be overruled.

E. The Employer's Objections No. 11 and 13

Objection Nos. 11 and 13 allege that neither the Petitioner nor the Intervenor may be certified as the bargaining representative of the guard units herein as they admit non-guards to membership and/or are "affiliated directly or indirectly with an organization which admits to membership, employees other than guards" as prohibited by Section 9(b)(3) of the Act. This issue was litigated in the preelection hearing, and the Region concluded in its Decision and

[19] 228 NLRB 1311 (1971)

Direction of Election, to which no request for review was filed, that both the Petitioner and the Intervenor were guard unions as defined in Section 9(b)(3) of the Act. The two objections are essentially attempts by the Employer to relitigate an appropriate unit issue in the case that has been fully considered and decided in the Decision and Direction of Election. See *Union Square Theatre Management,* 326 NLRB 70 (1998); *Fruehauf Trailer Co,* 106 NLRB182 (1953). Because these two objections raise no matters not previously considered and decided, I recommend that the Employer's Objection Nos. 11 and 13 be overruled.

F. The Employer's Objection No. 12

The Employer alleges in its Objection No. 12 that the Intervenor made a false complaint to the California Highway Patrol, the state agency providing security contract oversight, regarding the accuracy of the addresses on the Excelsior lists provided by the Employer. The Employer presented no evidence that the allegedly false statements were repeated to or known by any unit employee. In its brief, the Employer argues that the complaint was essentially an accusation of fraud and "should be deemed per se unlawful" but cites no authority for that proposition. Even assuming employees knew of the Intervenor's accusations, I find the principles of *Midland National Life Insurance* apply, and complaint to the State of California agency does not constitute objectionable conduct. I recommend that the Employer's Objection No. 12 be overruled.

G. The Employer's Objection No. 14

Objection No. 14 concerns allegations that representatives of the Petitioner and Intervenor falsely told unit employees they represented the Employer and the Employer supported the Unions.

Unit employee, Ramon Perez (Mr. Perez) testified that during the union campaigns, individuals who wanted to talk to him about a "union" contacted him on several occasions at his home. Although he did not believe them, Mr. Perez understood two of the individuals to say they were from the company. He watched a union campaign video they left with him but could recall little of its content. Although I found Mr. Perez to be a sincere and forthright witness, I cannot ignore the fact that he had difficulty understanding and replying to questions in English. In light of a demonstrable communication problem, I cannot be assured that Mr. Perez understood what the union representatives said to him, and I cannot rely on his testimony of what they told him. As no reliable evidence supports this objection, I find it unnecessary to consider whether the situation falls within the reasoning of *Midland National Life Insurance*, supra. I recommend that the Employer's Objection No. 14 be overruled.

H. The Employer's Objection No. 16 and Intervenor's Supplemental Objection

The Employer's Objection No. 16 and Intervenor's Supplemental Objection allege that employer supervisors and managers campaigned for the Petitioner and Intervenor and threatened, coerced and intimidated employees in the exercise of Section 7 rights.

No evidence was presented in support of allegations that employer supervisors and managers campaigned for the Petitioner and Intervenor. Accordingly, I recommend that the Employer's Objection No. 16 and Intervenor's Supplemental Objection be overruled.

I. The Employer's Objection No.17

The Employer alleges that the Petitioner and the Intervenor threatened, coerced, and intimidated employees. The only evidence presented in support of this objection related to the Employer's contention that Petitioner unlawfully paid eligible voters for their support.

During its campaign, the Petitioner paid two of the Employer's employees their usual hourly rate for off-duty hours spent working on the Petitioner's campaign. The Board has considered analogous situations involving a union's payment to election observers. Objectionable conduct was found in *Easco Tools,* 248 NLRB 700 (1980), where the union informed three eligible voters that if they served as election observers for the Union they would be paid for their regular 8-hour workday even if they returned to work after the election, and in *S & C Security, Inc.,* 271 NLRB 1300, 1301 (1984), where a union observer was paid the equivalent of over seven hours of work even though he acted as observer on his day off and, thus, required no reimbursement. The Board has also found excess election-day transportation payments to employees to be objectionable, stating "monetary payments that are offered to employees as a reward for coming to a Board election and that exceed reimbursement for actual…expenses amount to a benefit that reasonably tends to influence the election outcome." *Sunrise Rehabilitation Hospital,* 320 NLRB 212 (1995). In *J.R.T.S. Limited, Inc.,* 325 NLRB 970, FN 1 (1998), the Board found no objectionable conduct where no evidence existed that the union's payments to observers were known to other voters and the vote margin showed the payments could not have affected the election. The Petitioner cites *Kustom Electronics, Inc. v. NLRB,* 590 F2d 817, 823 (CA 10, 1978) for authority that any payments to employees in this case were unobjectionable. Although the underlying Board case does not mention that issue, in its decision, the court refers to the Board's reasoning:

> The Board did not consider [compensation of witnesses] to be anything more than remuneration for loss of time and hence they did not invalidate the election. The same was true of workers who were compensated on an hourly basis for time spent in aiding the Union in its campaign. Sometimes the payments exceeded somewhat the payments they received from the Company. The Board did not believe that the payments were of such a nature that they in themselves established that the employees were influenced because of it.

In the instant matter, there is no evidence the Petitioner did other than give two unit employees compensation consistent with the hourly wage rates of the Employer for performing work related to the Petitioner's campaign. There is no evidence that the compensation constituted a reward or a windfall to the employees.[20] There is likewise no evidence that the payments would be expected to cause the two employees to feel like ingrates if they voted against the Petitioner. In analogous circumstances, the Board has applied the test of whether the "challenged conduct has a reasonable tendency to influence the election outcome." *Sunrise Rehabilitation Hospital*, supra at 213. Here, there is no basis for inferring that any employee, including the two compensated workers, could reasonably have perceived the payments to be a gratuity for a pro-Petitioner vote and adjusted his vote accordingly. Consequently, the Petitioner's payment to off-duty unit employees for time spent working on the Petitioner's campaign is not objectionable conduct.

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[20] This case is different from *Plastic Masters, Inc. v. NLRB,* 512 F2d 449 (6th Cir. 1975) cited by the Employer. In that case the Union paid a greater compensation than their hourly wage rates to employees for such union-related assistance as attendance at a representation hearing, and the employees were consequently "overpaid" by the union. Id at 450.

J. The Intervenor's Objection No. 2

The Intervenor alleges that the Employer provided benefits in order to influence employees' votes. On January 10, the State of California awarded the Employer a contract to provide statewide guard services, the MSA, which agreement became effective February 1. The Employer was obligated to comply with the terms of the MSA. By letter dated January 27, the Employer informed unit employees that it had reinstated vacation pay of 40 cents per hour, and improved health insurance benefits, all of which were consistent with the terms of the MSA.

There is no evidence to controvert the Employer's assertion that its announcement of benefits was "governed by factors other than the pending election." *American Sunroof Corp.,* 248 NLRB 748 (1980). There is no link between the Employer's contract negotiations with the State of California and the union campaigns. The announced benefits were incidental to the conclusion of those negotiations. There is also no evidence that the Employer's timing of the benefit announcement was motivated by a desire to discourage union support. See *Mercy Hospital Southwest Hospital*, 338 NLRB No. 66 (2002). The situation differs from that of *Brown City Casting Company,* 324 NLRB 848 (1997) cited by the Intervenor. In that case, the employer hosted a party to announce improved health benefits two days before the election. The Board concluded the timing and format was calculated to affect the outcome of the election. Here, the Employer communicated the changes to employees by letter dated January 27, eleven days before an extended period of mail balloting commenced. The letter specifically noted that the employee benefit increase was "required by the terms of the contract specified by the State," which statement would reasonably deflect employee belief that the Employer had, *sua sponte,* conferred a benefit. Moreover, by the terms of the MSA, the vacation pay benefit was scheduled to appear in employees' bi-weekly paychecks after February 1. If the Employer delayed announcement of the vacation pay increase until after the election, employees would receive unexplained increases in several paychecks, an unacceptable consequence. As to benefit improvements, the January 27 letter specifically noted that "the State sets a 'benefit rate,' which is the amount [the Employer] is required to contribute…the State has increased the benefit…[a]s a result [of which] Inter-Con has expanded and improved your Employee Benefit Program…." The new plan, which required employee action in certain instances, went into effect February 1.

Having recently concluded the MSA, it was reasonable for the Employer to communicate to its employees changes in their terms and conditions of employment. The Employer did not attempt to portray the changes as employer largesse but essentially gave, or at least shared, credit with the State of California for any improvements. More importantly, it was necessary for the changes to be communicated before February 1 as benefit and payroll changes would take place at that time. I cannot find the Employer's January 27 letter was calculated to, or would reasonably be likely to, affect the outcome of the election. Accordingly, I recommend that the Intervenor's Objection No. 2 be overruled.

K. The Intervenor's Objection No. 3

The Intervenor alleges that the Employer's supervisors interrogated employees about their union sympathies and voting preferences and encouraged them to vote against the Intervenor. The Intervenor claims that Emmett Gilliard (Mr. Gilliard), who the Intervenor contends is a supervisor within the meaning of the Act, interrogated employees as to how they would vote in the election. The intervenor presented no evidence in support of this allegation.

The Intervenor further alleges that Harold Harbeson (Mr. Harbeson) encouraged employees to vote for the Petitioner. Nema Jayroe (Ms. Jayroe) consultant and organizer for the Intervenor, met with several unit employees in February or March at a guard shack when Mr. Harbeson was present. In the course of the meeting, Mr. Harbeson told employees that he thought they should vote for the Petitioner because it had a longer history than the Intervenor. A week later, employee Dennis Looram (Mr. Looram) gave Ms. Jayroe a signed Intervenor authorization card. The following week, Mr. Looram told Ms. Jayroe he had rescinded his card in writing. Nothing in Mr. Harbeson's expressed opinion that employees should vote for the Petitioner could reasonably be construed as coercive.

Further, there is no evidence that Mr. Gilliard or Mr. Harbeson exercised any of the primary indicia of supervisory status as defined by Section 2(11) of the Act or that they are supervisors within the meaning of Section 2(11) of the Act. Any lack of evidence is construed against the party asserting supervisory authority, i.e. the Intervenor. *NLRB v. Kentucky River Community Care,* 121 S.Ct. 1861 (2001). The Intervenor has not met its burden of proving Mr. Gilliard or Mr. Harbeson's supervisory status. Accordingly, I recommend that Intervenor's Objection No 3. be overruled.

L. The Intervenor's Objection No. 4

The Intervenor alleges that a supervisor, Joe Barrett (Mr. Barrett) required employees to mark a "sample ballot" and return it to the Employer and discouraged Intervenor representatives from speaking to employees.

Unit employee Virgil Hill (Mr. Hill) testified that Mr. Barrett, CGS, and the only other employee at the EDD Indio office, gave him a sample ballot and asked him to fill it out and send it in to the company.[21] Mr. Hill said doing so violated his privacy and constitutional rights. Mr. Barrett told Mr. Hill that if he threw the ballot away, the company would know he was going to vote for the union.

On another occasion during the union campaign, Ms. Jayroe went to the worksite of employee Laurie Genter (Ms. Genter). As Ms. Jayroe was leaving the parking lot, Mr. Barrett, in the presence of Ms. Genter, told her to leave employees alone and stop harassing them.

The evidence does not establish that Mr. Barrett was a supervisor within the meaning of Section 2(11) of the Act or an agent of the Employer at the time of either of the above interchanges. As discussed above, the position of CGS did not entail duties or authority sufficient to demonstrate statutory supervisory status. There is no evidence that Mr. Barrett's duties or authority distinguished him from other CGS's or that he exercised any of the primary indicia of supervisory status as defined by Section 2(11) of the Act or otherwise met supervisory criteria. Any lack of evidence is construed against the party asserting supervisory authority. *Kentucky River Community Care,* supra. Accordingly, I conclude that the Intervenor has not met its burden of proving supervisory status of Mr. Barrett, and I find no evidence to support the Intervenor's Objection No. 4. Accordingly, I recommend that the Intervenor's Objection No. 4 be overruled.

[21] The sample referred to was a large official NLRB election notice meant to be posted at the Employer's work sites.

CONCLUSIONS

A. Challenged ballots

As detailed above, I recommend that the ballots of the following employees be opened and counted:

Sam J. Alcanter
Aryind Chandra
Michelle Chiles
Jeff Colen
David Cote
Ernest Cournyer
Jonathan Cullifer
Gabriel Del Castillo
Bruce Donat
Michael Doud
Emmett Gilliard
Willie Gooch
Brian Gray
Carlos Hernandez
Marvin Hunter
Luis Juarez
Francis Kumar
Irene Lopez
Barbara Madden
Joe W. Miller
Angela Moore
Jose A. Morales
Gerald Patterson
Jose A. Perez
Charles Prodan
Terry Proctor
Joseph Puccio
Michelle Ramirez
William Roeder, Jr.,
Michael R. Sanchez
Roger W. Smith
Gene Stinson
Charley Thomas, Jr.
Paul B. Thomas
Lillian Torres
Charlene Turner
Guadalupe Vargas
Elias Vergara
Warren Woods
Stephen Young

As detailed above, I recommend that the ballots of the following employees remain closed and uncounted:

James Abrichi
Alicia Antunez
Terry Atkinson
Francisco C. Benevente
Chip Benson
Lee Chang
Vickie Cobine-Burton
Samuel Cunningham
Vincent Darrah
Kinisha Doley
Donald Flowers
Shamil Galyautdinov
Daniel Guerra
Ethel Hatfield
Patricia Holt
Mister Jembere
Kerwyn Jones
John Lincoln
Angela Milton
Thurman Mosley Jr.
Henna Naseem
Abayoni Ogundairo
Vera Oleynik
Arturo Ordona
Vincente Pacheco
Timothy Raymond
Joshua Saldana
Jack Simpson
Dwaine Smith
Norma Tezarres
Michael Tully
Tia Troutman
Borris Tsitsver
Jim Erik Villanueva

Earnest Johnson	Robert A. Wagner
Munir Khan	Robert L. Wallace
David Kersey	James Waterman
Bruce Klempner	William Were

B. Objections

As explained above, I recommend that the Employer's and the Intervenor's objections, in their entirety, be overruled and that this matter be remanded to the Regional Director for appropriate action.[22]

Dated, at San Francisco, CA: June 23, 2003

Lana H. Parke
Administrative Law Judge

[22] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington D.C. an original and eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.

JD(SF)-43-03
Pasadena, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTER-CON SECURITY SYSTEMS, INC.
Employer

and **Case No. 21-RC-20520**

INTERNATIONAL UNION, SECURITY, POLICE, AND FIRE PROFESSIONALS OF AMERICA (SPFPA)
Petitioner

and

NATIONAL UNION OF SECURITY PROFESSIONALS
Intervenor

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